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NO. 82-598

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

IRA T. SMITH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DID THE INDICTMENT ALLEGE AND DID THE EVIDENCE ESTABLISH A FEDERAL OFFENSE UNDER 18 U.S.C. 2314 AND 2315 SO AS TO CONFER JURISDICTION UPON THE DISTRICT COURT WHERE THE JURISDICTIONAL $5,000 VALUE OF STOLEN PROPERTY WAS BASED UPON THE AGGREGATION OF 46 ITEMS ALLEGEDLY STOLEN OVER A FOUR-YEAR PERIOD FROM 25 DIFFERENT STORES IN 13 DIFFERENT CITIES AND NINE DIFFERENT STATES, WERE NOT ALL STOLEN BY THE SAME PERSON OR SOLD TO THE PETITIONER BY THE SAME PERSON, AND WHICH WERE NOT ALL TRANSPORTED OR RECEIVED BY PETITIONER AT THE SAME TIME?

II.

WHERE THE PRINCIPAL WITNESS AGAINST THE PETITIONER WAS AN ADDICT ACCOMPLICE

SHOULD THE TRIAL COURT INSTRUCT, WHEN REQUESTED TO DO SO, AS TO THE WEIGHT AND EFFECT THAT MAY BE GIVEN TO THE TESTIMONY OF SUCH A WITNESS?

III.

WHERE OFFICERS DURING THE EXECUTION OF A SEARCH WARRANT PERFORM A GENERAL EXPLORATORY SEARCH INCLUDING PHOTOGRAPHING OF ITEMS NOT THEN SEIZED, AND IS IN FACT A SHAM TO OBTAIN PROBABLE CAUSE FOR THE ISSUANCE OF A SECOND SEARCH WARRANT, SHOULD THE FRUITS OF BOTH SEARCHES BE SUPPRESSED?

A. SHOULD THE COURT OF APPEALS HAVE DECLINED TO PASS UPON THE REASONABLENESS AND LAWFULNESS OF THE SEARCHES BECAUSE THE SPECIFIC ATTACK MADE WAS NOT RAISED IN THE PETITIONER'S PRE-

TRIAL MOTION TO SUPPRESS, EVEN THOUGH THE ATTACK WAS MADE DURING TRIAL AND IN THE POST-TRIAL MOTION?

OTHER PARTIES INVOLVED

There were no other parties to this proceeding.

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OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, a copy of which is attached hereto as Appendix "A", is not yet reported.

There was no written opinion by the United States District Court for the District of Kansas.

Attached hereto as Appendix "B", is a copy of the Order of the United States Court of Appeals for the Tenth Circuit staying the issuance of a mandate until September 9, 1982, pending certiorari.

Attached hereto as Appendix "C" is Order Denying Rehearing on July 27, 1982.

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit was entered on July 6, 1982, affirming the Petitioner's

conviction and sentence in the United States District Court for the District of Kansas upon two felony criminal charges. A timely Petition for Rehearing was filed in the Court of Appeals and was denied and overruled on July 27, 1982.

This Petition for Writ of Certiorari is filed within 60 days of the Order denying Petitioner's Petition for Rehearing, and is therefore timely under the provisions of Rules 20.1 and 20.2 of this Court

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Fifth Amendment to the United States Constitution:

"No person shall... be deprived of life, liberty, or property, without due process of law;..."

Sixth Amendment to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him;..."

United States Code, Title 18:

Section 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
..."

Section 2311:

"As used in this chapter:...
'Value' means the face, par or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

Section 2314:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;...
Shall be fined not more than $10,000 or imprisoned not more than ten years, or both..."

Section 2315:

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more... moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;...
Shall be fined not more than $10,000 or imprisoned not more than ten years, or both..."

Federal Rules of Criminal Procedure:

Rule 7 (c) (1):

"In General. The indictment or the the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged..."

Rule 8 (a):

"Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Rule 12 (b)

"Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:...
(3) Motions to suppress evidence:..."

Rule 12 (f):

> "Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver."

Rule 41 (f):

> "Motion to Suppress: A motion to suppress evidence may be made in the court of the district of trial as provided in Rule 12."

Rule 52:

> "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF THE CASE

Petitioner, a 63-year old medical doctor and the Defendant below was indicted on two counts on January 28, 1981, in the United States District Court for the District of Kansas. In Count I it was charged that he "(From on or about January 1, 1977, to on or about the date of filing of this indictment...) did receive, conceal and store (46 specifically described items of art and collectibles) of a value of $5,000 or more, which constituted, and were a part of, interstate commerce, and the (defendant) knew said property to have been stolen... in violation of 18 U.S.C. 2315. In Count II Petitioner alone was charged with conspiring with unnamed persons, in violation of 18 U.S.C. 371, to commit the offense of interstate transportation of stolen goods of a value of $5,000 or more knowing the same to be stolen in violation of 18 U.S.C. 2314.

A jury trial resulted in the conviction of Petitioner on both counts, and on June 22, 1981, he was sentenced to two years imprisonment on both counts, to be served concurrently, and to pay a fine of $10,000 on each count. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed his conviction on July 6, 1982.

The evidence against Petitioner consisted of items seized from his home as a result of two search warrants, and the testimony of Marvin Gabb (a/k/a/Marvin Stevens). Gabb was a 41-year old four time convicted felon who had been a narcotics addict and shoplifter since he was age 17 to 18, concentrating on the theft of clothing and works of art and collectibles. Gabb and his wife's narcotic habits were financed by their thefts. Gabb testified he had the "largest heroin habit" in Kansas City, Missouri, and that he also

had a methadone habit. He testified his last dose of drugs was on the Saturday before trial commenced and during his testimony he said he was feeling a little bad from his withdrawal. Gabb testified his and his wife's habit cost between $700 to $1,000 a day. In order to secure Gabb's testimony against Petitioner, the Government "negotiated" an agreement with him by the terms of which he was granted immunity as to all his nonviolent crimes and the Government agreed to "assist" Gabb and his wife on pending state charges. They were both placed in the Federal Witness Protection Program, were relocated, their identities changed, and they were paid $900 per month.

Gabb testified he and other shoplifters sold their goods to his half-brother, Jerry Stevens, who operated a place of business that sold clothes and art objects. Petitioner was a customer of the

store. Gabb met Petitioner through Jerry Stevens, and when Jerry started having "cash flow" problems Gabb started selling his goods directly to individuals, including Petitioner. Gabb testified he had told the Petitioner the items were stolen. Petitioner insured the specific items, tagged some of them as to when, who from and how much he had paid for the items, and kept many of them on open display in his home. Petitioner testified he did not know the items were stolen and that he was a collector who had thousands of such items.

Gabb identified, during his testimony, some of the items as being similar to items that had been stolen by him. He positively identified a few items. He identified other items as having been sold by him to Jerry Stevens. Other items were not mentioned by Gabb in his testimony.

As a result of surveillance of Gabb by the

F.B.I. and local Missouri Police Petitioner was observed buying an item from Gabb in a parking lot. Gabb and his wife were eventually arrested and charged locally. F.B.I. Agent Weber attempted to elicit Gabb's cooperation against the Petitioner (a medical doctor). On September 18, 1980, a federal search warrant was executed at Petitioner's home in Overland Park, Kansas. This warrant listed four specific items, none of which were found. During the service of this warrant 35 items not listed on it were seized. Numerous other items were removed to the garage where they were photographed. Agents testified regarding the search and described Petitioner's home as looking like a museum.

After the publicity of this search Gabb realized he was in trouble because he, according to his testimony, knew Petitioner would tell where he bought the items. Gabb therefore agreed to

cooperate with the F.B.I. against Petitioner. The items seized and the photographs of the other items were shown to Gabb. A second search warrant was then executed at Petitioner's home on October 9, 1980, and 96 items were seized. These items were still on display. Petitioner was only charged with 46 items, and not all of them were identified as being stolen.

Prior to trial Petitioner filed a motion to dismiss attacking the jurisdiction of the Court and attacking the Indictment for failing to allege a federal offense and as being duplicitious. These attacks were renewed in his part during the trial motions for acquittal and in his post-trial motion.

Petitioner also filed a pre-trial Motion for Bill of Particulars, which was denied; and a pre-trial Motion to Suppress attacking the two search warrants and the searches and seizures. This motion attacked the execution of the

warrants by Missouri state law enforcement officers while in the State of Kansas. This motion was denied. During trial Petitioner attempted to make inquiry into other aspects of the legality of the two searches but the Government's objections thereto were sustained. In Petitioner's post-trial motion he attacked the searches on the basis that the first search warrant was a sham in order to gain access to Petitioner's home so as to conduct a general exploratory search and to thereby obtain probable cause for the second search warrant. Petitioner objected to the introduction of the exhibits during trial because of the unlawfulness of the search and seizure. The Tenth Circuit Court of Appeals refused to pass upon this issue because it had not been raised in Petitioner's pre-trial motion to suppress.

ARGUMENT

This proceeding involves important questions of federal law which have not been definatively determined by this Court, but that should be so as to establish a guide to the lower Courts.

I.

JURISDICTIONAL AMOUNT

The Indictment attempted to allege violations of 18 U.S.C. 2314 and 2315 by lumping together 46 items which the evidence established were stolen (not all by the same person) from 25 different stores, in 13 different cities in nine different states, over at least a four-year period, so as to satisfy the $5,000 jurisdictional requirement. The evidence clearly established that they were stolen at different times, transported at different times, and received by the Petitioner at different times, and not always by or from the same person. If the jurisdictional amount is not

satisfied the offense, or offenses, are state and not federal crimes. United States vs. Nall, (5th Cir. 1971) 437 F.2d 1177.

The usual situation involves the converse of the present case, that is, where the Government has alleged as separate counts multiple items, and it is the defendant that is claiming there should only have been one count. The Courts then seem to speak of "units of prosecution." See Bell vs. United States, 349 U.S. 81, 75 S. Ct. 620 (1955); Castle vs. United States, 368 U.S. 13, 82 S. Ct. 123 (1966) reversing 287 F.2d 657 (5th Cir. 1961); Gilinsky vs. United States, (9th Cir. 1966) 368 F.2d 487. In Asner vs. United States, (8th Cir. 1966) 367 F.2d 803, the defendant was charged in four counts with four checks all passed on the same day but at four different places. The Court there distinguished Castle in that the defendant there released

personal control over the four checks separately before they may have traveled in interstate commerce. Asner relied upon the test for determining whether there is an identity of offenses of "whether the same evidence is required to sustain them." In our present case this test when applied does not support a single offense jurisdiction.

The question then is, does 18 U.S.C. 2311 satisfy the "value" jurisdictional requirement. That statute provides, in part, that "the aggregate value of all goods... referred to in a single indictment shall constitute the value thereof." Does this statute authorize a conviction of a federal offense by the mere allegation of an essential element, or must the Government still prove that element? Federal jurisdiction cannot be established in a criminal case by mere accusation. Due process must require something

more in the way of evidence. If the indictment alleges the aggregate value as being $5,000 but the proof only established a value of $25 would 18 U.S.C. 2311 satisfy the jurisdictional element?

In Schaffer vs. United States, 362 U.S. 511, 80 S. Ct. 945, rehearing denied 363 U.S. 858, 80 S. Ct. 1605 (1960), affirming 266 F.2d 435 (2nd Cir. 1959), the defendants, who were garment store owners, had a standing agreement with a Tony Stracuzza, who had a deal with various truck drivers to turn over to him clothing that was being shipped. At loc. cit. 517 949, this Court said, "A sensible reading of the statute (18 U.S.C. 2311) properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated."

Petitioner would now suggest that this

Court should take the next step and pass upon the issue herein presented. Gabb and Petitioner were dealing at arms length. Gabb was selling his stolen goods to other persons, wherever he could get the best price. Petitioner did not buy everything offered to him. Indeed, as to some items Gabb testified he sold them to Jerry Stevens, and they later ended up in Petitioner's house. There was no plan or agreement by which Petitioner would buy all, or any part, of Gabb's stolen goods. It has long been held that the relationship of buyer and seller does not establish a conspiracy between them. See United States vs. Falcone, 311 U.S. 205 (1940); and United States vs. Varelli, (7th Cir. 1969) 407 F. 2d 735.

There has been much discussion recently about creeping federalism. In the present proceeding the Government has attempted to make numerous separate state offenses into one giant

federal case. If this approach is approved, then every "fence" will be punishable under federal law. Where is the break-off point? If a four-year spread is approved, would a 40-year spread be acceptable?

II.

NARCOTICS ADDICT INSTRUCTION

Petitioner requested that the trial Court give an instruction, in the form suggested by Devitt and Blackmar, Federal Jury Practice and Instructions, (3rd Edition), Section 17.03. This Requested Instruction (No. 6) was as follows:

> "If an accomplice is also a narcotics addict, there are additional reasons why his testimony should be considered with great care. An addict has a constant need for a supply of drugs and for money to support his habit, and also may have abnormal fear of imprisonment in which his supply of drugs might be cut off. These are special circumstances which you may consider in weighing

> testimony of this kind. You of course may give the testimony such weight as you think proper, after considering all relevant circumstances."

The District Court refused to give this instruction, or any one upon the same subject, and Petitioner objected to this refusal. The trial court did give an accepted instruction on an accomplice, a witness granted immunity, a felony conviction, and a general stock credibility instruction. All of these instructions applied to Gabb. However, Gabb admitted he stole to feed his narcotics habits, that he was still using drugs. He also testified his previous convictions came about as the result of his need for money to buy narcotics. He had previously been in the penitentiary, his probation having been revoked because of his use of drugs, and when he got out he returned to drugs.

Agent Weber, a self-proclaimed expert

on drug matters, testified addicts are generally liars, that they are "very vulnerable as informants because they will do anything to stay close to the narcotics," and that addicts do not want to go to prison where they can't get drugs. Gabb in his testimony agreed he did not want to go to prison and testified he was amazed the Government wanted Petitioner and was willing to turn him loose.

Without Gabb's testimony no case was or could have been made against Petitioner, and he knew who the Government was after before he negotiated his deal with the agents.

The requested instruction has been approved. In United States vs. Griffin, (6th Cir. 1967) 382 F.2d 823, the Sixth Circuit Court of Appeals reversed for failure to give such an instruction holding that it was plain error. In Government of Virgin Islands vs. Hendricks,

(3rd Cir. 1973) 476 F. 2d 776, 779, the Third Circuit held that such an instruction should be given if requested, but declined to reverse as plain error where the informer-addict was corroborated. See also United States vs. Kinnard, 150 U.S. App. D.C. 386, 465 F. 2d 566 (1972) and United States vs. Cooper, (5th Cir. 1972) 472 F. 2d 1017, cert. denied, 411 U.S. 983 (1973).

The Tenth Circuit Court of Appeals in its Opinion below held that such an instruction, even when requested, need not be given. Thus there is a conflict of opinion in the various Courts of Appeal.

In its Opinion below the Tenth Circuit held that the other credibility instructions sufficiently alerted the jury to consider Gabb's testimony with special care, and that the matter was explored extensively in the testimony. Of course, the matter was brought out in testimony. If it had not

been, no such instruction would have been required. The Court instructed upon certain matters effecting credibility but not upon the most important one in our present case, Gabb's addiction. The average juror may not have much knowledge about narcotics other than what he hears on television and may very well not be familiar with the horrors of withdrawal and possible unavailability of drugs in the mind of an addict. Where, as here, the Court failed to instruct on addict, but did on other factors (prior conviction, immunity, accomplice) the jury might well have understood that the Court, by its silence on the matter, was saying addiction was not a factor.

The conflict in the opinions of the Circuits should be laid to rest, and this Court should establish guidelines for the lower courts.

III.

SEARCH AND SEIZURE

The Court of Appeals in its Opinion refused to pass up Petitioner's attack upon the two searches and seizures because the specific attack, although made by way of objection during the trial (after the evidence revealed that the first search warrant was a sham) and during his post-trial motion. The basis for this ruling was that Federal Rules of Criminal Procedure Rule 12 (b) (3) and (f) provides for the "orderly proceeding during the trial of a case by eliminating from the trial disputes over police conduct not immediately relevant to the question of guilt."

The Petitioner did not deliberately by-pass that issue, but raised the issue upon learning during the trial that the basis for objection existed. The trial court certainly abused its discretion in not allowing Petitioner to inquire further into the

matter. In Petitioner's Petition for Rehearing filed in the Court of Appeals he sought an alternative Order remanding the proceeding to the District Court for a hearing on the issue raised in his attack.

The trial evidence revealed that the police when conducting the first search (for four items that were not found) photographed numerous items that were not seized for the purpose of later trying to establish that they were stolen. The search lasted six and one-half hours and during it officers (allegedly searching for four relatively large art objects) unrolled a rolled up paper (thus discovering and seizing Exhibit 2, a lithograph); opened a small drawer, found a daily diary, looked inside it, read it and seized it (Exhibit 49); interrogated Petitioner regarding his acquisition of numerous items; and seized 35 items not listed on the

warrant (Exhibits 1 through 9 being 9 of those 35 - no charge was made as to the other 26 items seized).

As a direct result of that search a second search warrant was issued and 96 more items were seized (Exhibits 10 through 46 - no charge was made as to the other 60 items seized).

Prior to the first search Agent Weber had unsuccessfully tried to learn what was inside Petitioner's home.

The careful search, the seizing of items not listed on the warrant, and the photographing of other items for the purpose of later determining if they were stolen, hardly falls within the "inadvertent" requirement of a "plain view" seizure. In Coolidge vs. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, reh. denied 92 S. Ct. 26 (1971), it was held that in order for that doctrine to apply it must be immediately apparent

to the police that the item seized was connected with crime. See also Lo-Ji Sales, Inc. vs. New York, 442 U.S. 219, 99 S. Ct. 2319 (1979).

The overstepping by the officers in this case, as revealed during the trial, was far too outrageous and unacceptable to be approved by the expedient adopted by the Court of Appeals. This Court should examine this issue so as to establish a precedent regarding such searches.

The evidence against the Petitioner was weak, the essential criminal element (i.e.: knowledge) being established by the uncorroborated testimony of Marvin Gabb, and the constitutional error should not be held to be harmless.

CONCLUSION

Wherefore, Petitioner respectfully suggests and prays that a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, and that such judgment and opinion should be reversed and Petitioner be ordered discharged or a new trial be directed.

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